LIAN MENG WAH

v.

WEE SU LIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[CIVIL SUIT NO: S-22-629-2009]
8 OCTOBER 2010

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Plaintiff claimed malicious prosecution and abuse of process - Whether defendant liquidator sued in personal capacity - Whether prejudice caused to defendant - Whether plaintiff could prove malicious prosecution - Defendant put plaintiff to strict proof - Whether this raised triable issue to be proved in full trial - Whether pleadings disclose reasonable cause of action - Whether difficulty to prove abuse of process valid ground to strike out statement of claim - Defendant's leave application to commence committal proceeding dismissed - Whether committal proceedings could be said to have commenced against plaintiff*

The 4th defendant, the liquidator of Asia Radio Sdn Bhd ('the company'), alleged that the plaintiff had affirmed an affidavit in a suit between them bearing a forged signature, and proceeded to apply for leave to commence a committal proceeding against the plaintiff. The leave application was dismissed and the 4th defendant's subsequent appeal for leave was also dismissed. This led the plaintiff, the solicitor for the 4th defendant, to initiate an action against the 4th defendant for malicious prosecution and abuse of process. The 4th defendant contended that he was wrongly named as a defendant, as it was the company that commenced the committal proceeding against the plaintiff. Furthermore, he argued *inter alia* that since the application for leave and the subsequent appeal was dismissed, the committal proceedings could not be said to have commenced against the plaintiff, thus the plaintiff would not be able to prove malicious prosecution. Based on the above, the 4th defendant made this application to strike out the plaintiff's action.

Held (dismissing the defendant's application with costs):

(1) The 4th defendant here was sued in his capacity as the liquidator of the company and not in his personal capacity. There was no prejudice caused to him. Furthermore, he had

A stated in the affidavits that he was the liquidator of the company. There was no doubt that his liability at the end of the trial was in his capacity as a liquidator of the company. (paras 16 & 18)

B **(2)** It was not necessary to make a fine distinction on when a committal action was said to have commenced. The requirement that leave should be obtained first before the action proper could proceed, was merely to ensure that a certain threshold test was met. Even if there was no C commencement of the committal proceeding, the issue of further prosecution of it had to be addressed *ie*, where the plaintiff had to argue against the appeal for leave. (para 23)

(3) The 4th defendant had made bare denials regarding the claims made against him in the plaintiff's statement of claim, and had D put the plaintiff to strict proof thereof. This by itself raised triable issues to be proved in full trial. (paras 36-45)

(4) The pleadings premised on the cause of action of malicious prosecution and/or abuse of contempt proceedings to injure E the plaintiff did disclose a reasonable cause of action. The fact that it would be difficult to prove abuse of process in itself was not a valid ground to strike out the statement of claim. (paras 46 & 47)

F **Case(s) referred to:**

Associated Tractors Sdn Bhd v. PMB (KULIM) Sdn Bhd & Ors [1988] 1 LNS 208 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Liquidator) Chi Liung & G *Sons Sdn Bhd (In Liquidation) [1996] 2 BLJ 9 HC* ***(refd)***

Clements v. Ohrly [1847] 2 C & K 686 ***(refd)***

Hicks v. Faulkner [1878] 8 QB 167 ***(refd)***

In Re Farrow's Bank, Limited [1921] Ch 164 ***(refd)***

In Re Millingen's Limited [1934] SC 72 ***(refd)***

H *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA* ***(refd)***

Ler Cheng Chye, Liquidator of Castwell Sdn Bhd (In Liquidation) v. Director of Customs, Federal Territiory [1992] 2 MTC 185 HC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

I *Malz v. Rosen [1966] 1 WLR 1008* ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam As The Receiver And Manager And Liquidator Of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899 HC ***(refd)***
Stead Hazel And Company v. Cooper [1933] KB 840 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236(2)(a), 269(1)(b)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d), O. 52 rr. 2, 3

For the applicant/4th defendant - Raymond Kwok; M/s Kwok & Co
For the plaintiff/respondent - In person

Reported by Melinda Robert

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] This case highlights the dangerous practice of not affirming an affidavit before a commissioner for oaths and to do so in the cozy comfort of one's office and leaving it to one's office boy to bring it to a commissioner for oaths who is said to have constructive knowledge of one's signature. The practice must stop, else when objections are raised, the deponent might find himself facing a contempt action.

Problem

[2] The plaintiff was at all material times an advocate and solicitor of the High Court of Malaya. The 4th defendant is the liquidator of Asia Radio (M) Sdn Bhd. The 4th defendant had on or about June and August 2000, appointed the plaintiff's legal firm Messrs MW Lian & Associates to act for them for the disposal of two properties. A dispute subsequently arose between them that resulted in the 4th defendant commencing a legal suit against the plaintiff and obtained judgment in default against the plaintiff on 10 May 2002 for RM195,985. There was no execution on this judgment because the plaintiff had made payments to the Inland Revenue Board for the monies retained by the plaintiff towards such payment. There was also a judgment in default of defence

for a declaratory order against the plaintiff obtained on 16 June 2003 that the plaintiff be liable for all losses, penalties and expenses incurred by the delay in payment of the RPGT.

[3] The plaintiff applied to set aside the judgment in default of defence and various affidavits were filed. There was an affidavit affirmed by the plaintiff on 12 June 2006 (the impugned affidavit) that seemed to have stir up the hornets' nest. The 4th defendant had commenced an action in the High Court for leave to commence committal proceedings against the plaintiff apparently because the commissioner for oaths' signature is forged and the rubber stamp in the impugned affidavit is false. The leave application was dismissed on 28 March 2007. The 4th defendant initially did not appeal against the said refusal of leave.

[4] The plaintiff made a file search several months later and discovered the draft order of dismissal and promptly issued a letter of demand dated 17 September 2007 to the then 4th defendant's solicitors Messrs Low Chee Hoong claiming abuse of process to malign the liberty and professional livelihood of the plaintiff.

[5] According to the plaintiff in his pleaded case, the 4th defendant reacted to the letter of demand by filing a notice of motion dated 5 October 2007 for leave of the Court of Appeal for extension of time to file the notice of appeal. Leave was granted on 17 December 2008 by the Court of Appeal in the absence of the plaintiff.

[6] The appeal was unanimously dismissed with costs on 21 January 2009 but not after the plaintiff had engaged the help of a senior counsel to assist him in the appeal hearing.

[7] The plaintiff brought this action for damages for malicious prosecution of contempt by the 4th defendant against the plaintiff and for abuse of process of court by the 4th defendant. Particulars of malice and abuse of process were set out in the amended statement of claim.

[8] Some of the 'particulars of abuse of process' are as follows:

(a) Using the contempt proceedings for collateral purpose that is to pressure the plaintiff to concede and to settle with the 4th defendant in the pending Kuala Lumpur High Court Suit: S2-22-319-2002,

(b) Using the contempt proceedings to work oppression, knowing that the plaintiff is a practicing lawyer and contempt proceedings shall malign his liberty as well as his professional livelihood as a lawyer,

(c) Unilaterally, taken over the contempt proceedings and to prosecute the same by the defendants themselves and thus usurp the function of the Attorney General and the Police,

(d) Without awaiting for the outcome of the Police Investigation, prematurely using and abusing contempt proceedings to launch attacks on the plaintiff's reputation, liberty, personality,

(e) Exhibited a '*mala fide*' conduct whilst making an appeal to reinstate and to obtain the leave to institute committal proceedings against the plaintiff. The appeal was dismissed with costs by the Court of Appeal and the defendants knew that the said appeal was not '*bona fide*' and hence, it was dismissed by the Court of Appeal on 21 January 2009.

[9] The 4th defendant had also made a complaint to the Bar Council on 8 November 2001 with respect to the plaintiff's non-refund of excess monies after paying for Real Property Gains Tax (RPGT) on behalf of the 4th defendant in one property the sum of RM10,292.60 and in another the sum of RM27.093.80.

[10] The disciplinary board found that the plaintiff had delayed payment of the RPGT though all the monies retained were properly accounted for. A fine of RM2,000 was imposed on the plaintiff as being appropriate punishment taking into consideration the suspension that had been obtained by the Bar Council pending the outcome of the complaint hearing before the disciplinary board.

Prayer

[11] Enclosure 13 is the 4th defendant's application by way of summons in chambers to strike out the plaintiff's writ of summons and statement of claim, pursuant to O. 18 r. 19(1)(a) or (b) and/or (d) RHC 1980 and/or under the inherent jurisdiction of the court.

A **Principles**

Whether The Plaintiff Had Sued The Wrong 4th Defendant?

[12] Counsel for the 4th defendant argued that the party which made the application for leave to commence contempt proceedings against the plaintiff was "Asia Radio (M) Sdn Bhd (No. Syarikat: 8787-D (Dalam Likuidasi Sukarela)" (see exh. "GK2" p. 5 of encl. 13 - Saman Dalam Kamar - *ex parte*). This same party had appealed to the Court of Appeal against the learned judge's refusal to grant leave.

[13] The 4th defendant submitted that in the circumstances, the plaintiff's claim should have been filed against Asia Radio (in voluntary liquidation). Instead, the plaintiff is suing the liquidator personally. Although he has described the 4th defendant as "GOW KOW (Liquidator Asia Radio Sdn Bhd)", the 4th defendant submitted that this is still incorrect as the 4th defendant should be Asia Radio (M) Sdn Bhd (in voluntary liquidation). As such it was contended that on this ground alone, the writ and statement of claim should be struck out.

[14] The 4th defendant also referred the court's attention to s. 269(1)(b), read with s. 236(2)(a) of the Companies Act 1965. Learned counsel for the 4th defendant also referred the court's attention to *In Re Farrow's Bank, Limited* [1921] Ch 164, *In Re Millingen's Limited* [1934] SC 72, *Stead Hazel And Company v. Cooper* [1933] KB 840. I have no problem with the principle enunciated in that a liquidator is generally not liable in his personal capacity but in his capacity as a liquidator when an action is filed against him for matters done or not done when it should have been done while acting as a liquidator.

[15] From what I can see from decided cases in our own jurisprudence, a liquidator can be sued in his capacity as liquidator or the suit can be brought against the company (in liquidation). I did a quick search of cases under the Current Law Journal online by typing in the word 'liquidator' under Case Law Search and in the box 'Case Name'. Some cases where a liquidator has sued or has been sued and how they have been so named are as follows:

Chi Liung Holdings Sdn Bhd v. Soon Kok Seng (Liquidator) Chi Liung & Sons Sdn Bhd (In Liquidation) [1996] 2 BLJ 9,

Selvam Holdings (Malaysia) Sdn Bhd v. Toby Lam as the Receiver and Manager and Liquidator of Selvam Holdings (M) Sdn Bhd & Anor [1994] 4 CLJ 899,

Ler Cheng Chye, Liquidator of Castwell Sdn Bhd (In Liquidation) v. Director of Customs, Federal Territiory [1992] 2 MTC 185.

[16] So long as the liquidator is not sued in his personal capacity that would suffice. Here the liquidator is sued in his capacity as liquidator of the company as designated by the bracketed words. I do not see any prejudice to the 4th defendant. Like all professionals, a liquidator faces the hazards of being sued in the discharge of his professional duties.

[17] When he entered appearance, and an ordinary appearance and not an unconditional one, he had stated through his solicitors as follows:

> Masukkan kehadiran untuk GOW KOW (sebagai liquidator Asia Radio Sdn Bhd) iaitu Defendan Keempat dalam tindakan ini.

[18] There is no doubt that his liability if established at the end of the trial is one in his capacity as a liquidator of Asia Radio Sdn Bhd. He had in the introductory paragraph of every affidavit that he filed stated that he is the liquidator of the said company and that he had been duly authorized to affirm the various affidavits.

Whether The Plaintiff's Claim Lacks All The Ingredients Required To Prove Malicious Prosecution And/or Abuse of Process?

[19] In a suit for malicious prosecution the plaintiff must prove *inter alia*:

(a) that the defendant prosecuted an unsuccessful action against the plaintiff;

(b) that the defendant instituted the action maliciously;

(c) that there was no reasonable and probable cause for the said action.

(see *Hicks v. Faulkner* [1878] 8 QB p. 167; *Clements v. Ohrly* [1847] 2 C & K 686).

[20] With regard to requirement (a), the 4th defendant submitted that the plaintiff had failed to show that committal proceedings were commenced by the 4th defendant.

[21] The 4th defendant argued that an application for an order of committal can only be applied for by way of motion (O. 52 r. 3 Rules of the High Court 1980). O. 52 r. 3 states:

> (1) When leave has been granted under r. 2 to apply for an order of committal, the application for the order must be made by motion to the court and, unless the court or judge granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.
>
> (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

Before the application by motion can be made the applicant must first apply *ex parte* for leave to do so (O. 52 r. 2 Rules of the High Court 1980).

O. 52 r. 2 RHC reads:

> (1) No application to a Court for an Order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the applicant is made, verifying the facts relied on.

[22] It was further contended that until leave is obtained from the court a party cannot be said to have commenced committal proceedings. Here the 4th defendant had failed to obtain leave from the High Court and further failed in the Court of Appeal.

[23] I do not think that one needs to make such a fine distinction on when a committal action is said to have commenced. As the RHC requires leave, then an action has to be commenced by first obtaining leave before the action proper can proceed. This leave application is to ensure that a certain threshold test is met. Even if it can be said that there was no commencement of the committal proceeding, one must still address the further prosecution of it in the appeal process where the plaintiff and his senior counsel appeared to argue against the leave appeal.

[24] I cannot at this stage agree with the 4th defendant's contention that it is clear that the plaintiff will not be able to show that the 4th defendant's application for leave and subsequent appeal to the Court of Appeal were instituted maliciously and that the 4th defendant had no reasonable or probable cause for doing so.

[25] The 4th defendant's confidence stems from the fact that the 4th defendant's affidavit in support of the *ex parte* application for leave under O. 52 r. 2 Rules of the High Court contained clear documentary evidence showing that the plaintiff had used documents bearing false commissioner for oaths signature and rubber-stamp in three separate suits - (see affidavit to Gow Kow in encl. 13 paras. 5.1, 5.2, 5.3, 6.1 and 6.2 in particular, para. 6.2.2).

[26] The 4th defendant's contended that by reason of the above it is clear that the application for leave by Asia Radio (in voluntary liquidation) was not instituted maliciously. On the contrary it shown that the applicant/4th defendant had reasonable and probable cause for bringing to the High Court's attention the attempts by the plaintiff to subvert the judicial process. The application in doing so was acting in the *bona fide* belief that it was discharging a public duty. See affidavit of Gow Kow in encl. 13, para. 7). (See *Malz v. Rosen* [1966] 1 WLR 1008)

[27] For my part, I would have thought that if the 4th defendant had been motivated by a public duty, his solicitors would have advised him that before an action is taken, the plaintiff should be given an opportunity to explain how he could have affirmed an affidavit before a commissioner for oaths who had already retired on the date the impugned affidavit was affirmed.

[28] The plaintiff had also lodged a police report stating the circumstance under which he had signed the affidavit. In short, he had passed it to his office boy after signing it for the office boy to take it to the commissioner for oaths. One must not be hasty to jump to conclusion without given an opportunity to the other side to explain. In any event this is a matter for the police to investigate.

[29] The 4th defendant stated that he had attempted to bring this misconduct and subversion of justice to the court's attention because the plaintiff, being an advocate and solicitor, is an officer of the court. Whilst the 4th defendant may believe in the rightness and righteousness of his claim even to the extent of being over-zealous, surely before an action is pursued to seek to commit an advocate and solicitor for contempt, care must be taken to ensure that it is not a case of a personal vendetta or vengeance because of previous antecedents. I sense an element of vindictive vengeance coupled with vituperative vendetta beneath the veneer of a vigorous venture to preserve the dignity and integrity of the court. I wonder if there had been no antecedents of the aggravation, animosity, agitation and anguish between the parties, would a litigant who had come across an affidavit signed under such a circumstance pull the trigger aimed at the party signing the affidavit and commenced an action for contempt against the litigant signing the affidavit. I see no harm in writing perhaps even a strongly worded letter to the plaintiff asking for an explanation for what appears to be incontrovertible evidence in the form of a police report lodged by the commissioner for oaths and a statutory declaration of the said commissioner for oaths and the confirmation from the Registrar of the Federal Court that the said commissioner for oaths had ceased to be one when he was said to have signed and placed his rubber stamp on the impugned affidavit.

[30] Imagine if this is a scam where some nefarious elements with quick money to be made had enlisted the help of office boys to achieve their evil ends. Imagine further that it is discovered that not a few affidavits filed in court actually bore a similar signature of the commissioner for oaths that had retired and his rubber-stamp. Would we be seeing a sudden surge of leave application for contempt against an advocate and solicitor who has signed his affidavit though not properly affirmed before a commissioner for oaths?

[31] I may not have prophetic insight but I venture to say 'probably not'. A

[32] Counsel for the 4th defendant used the analogy of a snatch-thief for comparison and he said that one does not have to ask the snatch-thief to explain why he did what he did before apprehending him. With respect, the analogy is not appropriate. Perhaps the analogy of a cheque issued from a solicitor's account which was later 'stopped payment' would be more helpful. One would want to know why the payment was stopped rather than jumping to the conclusion that it must be the solicitor did not have enough money in the client's account. Here, the plaintiff said that there is no issue that his signature and the 4th defendant/applicant is also not contending that the 4th defendant's signature is forged. Documentary proof of one's case and here the statutory declaration of the said commissioner for oaths and the letter of confirmation from the Registrar of the Federal Court are documents which do not vanish into thin air even if after being armed with it, one were to give an opportunity to a fellow colleague at the Bar to explain how the signature of the commissioner for oaths had been forged and his rubber stamp false. B C D E

[33] I had also pointedly asked counsel for the 4th defendant whether when he affirms an affidavit or swears a statutory declaration does he do so physically before a commissioner for oaths. His answer was that he was not on trial and that he would decline to answer the question. Sometimes silence speaks louder than speech. We must not set for others a higher standard than that which we set for ourselves. Conversely we set for ourselves the same high standard as we expect of others. F G

[34] The plaintiff submitted that an analysis of the plaintiff's pleadings would show that the 1st amended writ and amended statement of claim dated 10 September 2009 discloses that this is not a plain and obvious case to be struck out, summarily. I would call that the patently plain and obviously unsustainable test. H

[35] The indorsement in the 1st amended writ disclosed that the plaintiff's claim against the defendants is for malicious prosecution and further and in the alternative abuse of contempt proceedings to injure the reputation, liberty, personality and personal interests of the plaintiff. I

[36] The particulars of malicious prosecution are stated at paras. 14 and 15 of the statement of claim, particulars of bad faith and/or malice are stated at para. 16(i) to (vii) and particulars of abuse of contempt proceedings are stated at para. 16(a) to (e) of the statement of claim.

[37] In defence to the charge of malicious prosecution preferred against the 4th defendant, the 4th defendant *vide* para. 9.1 of the defence, made bare denials of paras. 14 and 15 of the statement of claim and put the plaintiff to strict proof thereof.

[38] Plaintiff contended that the defendant by putting the plaintiff to strict proof thereof, by itself raises triable issues to be proved in a full trial. Hence, this is not a plain and obvious case to strike out the pleadings, summarily.

[39] The plaintiff argued that in the light of the decision in the case of *Associated Tractors Sdn Bhd v. PMB (KULIM) Sdn Bhd & Ors* [1988] 1 LNS 208 this bare denial/assertion, without condescending to particulars to support the defendants' contention that they have merits in their defence, failed to show that the defendants had any merits therein.

[40] The plaintiff also contended that the tort of malicious prosecution must be proved by circumstantial evidence, hence this necessitates a full trial by calling witnesses and tendering documentary evidence; hence this is not a plain and obvious case to be struck out, summarily.

[41] The plaintiff further drew the court's attention to para. 11 of the defence, where the 4th defendant made bare denials of para. 16 of the statement of claim regarding the particulars of malice and/or bad faith and the charge of abuse of contempt proceedings to injure the plaintiff and put the plaintiff to strict proof thereof.

[42] The plaintiff submitted that by putting the plaintiff to strict proof thereof, this raises triable issues to be proved in a full trial. Malice and/or bad faith, as particularized in para. 16 of the statement of claim, must be proved by circumstantial evidence in a full trial. Likewise, the same applies to the tort of collateral abuse of contempt proceedings.

[43] At para. 12 of the defence, the 4th defendant made bare denials of losses and damages stated in para. 17(i), (ii) and (iii) statement of claim and put the plaintiff to strict proof thereof. A

[44] The plaintiff submitted that he shall then take the challenge and shall prove the losses and damages in a full trial; hence his claim ought to proceed to trial to prove the losses and damages. B

[45] I find merits in that argument. The caution and circumspection with which a court would act before striking out a pleading has been distilled for us in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11, where Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) held: C

> The principles upon which the Court acts in exercising its powers under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in **plain and obvious cases** that recourse should be had to the summary process under this rule (per Lindley M.R. in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91). and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*Attorney-General of Duchy of Lancaster v. L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and the facts of the case, in order to see whether a party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA.) The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 (which is in *pari materia* with our O. 33 r. 2 Rules of the High Court) *(Hubbuck v. Wilkinson) (supra)*. The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis added) D E F G

[46] The pleadings premised on the cause of action for malicious prosecution and/or abuse of contempt proceedings to injure the Plaintiff does disclose a reasonable cause of action. Neither can one say that it is frivolous and vexatious and otherwise an abuse of the court's process. I bear in mind the caution of the Federal Court in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 where Wan Suleiman FJ said: H I

A It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v. Peat Marwick & Mitchell* [1967] 1 MLJ 87.

B

[47] Perhaps the tort of abuse of process may be difficult to prove but that by itself is not a valid ground for striking out the statement of claim. The position of the law with respect to this relatively newer tort is succinctly summarized by Gopal Sri Ram C JCA as he then was in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 at p. 540-541:

It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise D where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion. (See, E *Grovit & Ors v. Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse F to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed. (See, *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557.)

A fairly recent decision on the point is that of the English Court G of Appeal in *Gilham v. Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the County Court was held to be an abuse of process. It was there held that whether in a particular case there was an abuse would be a question of fact and degree.

H Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, I

it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

This court dealt with the point fairly recently in the context of the tort of abuse of process. It was in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 MLJ 425. I there said (at p. 434):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p. 489 he said:
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> > In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its truecourse so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

A

Pronouncement

[48] Having considered the arguments in totality and the principles applicable, I dismissed the 4th defendant's application with costs in the cause.

B

Postscript

[49] With malice toward none, with charity for all, with firmness in the right, to borrow the enduring line from Abraham Lincoln, let us as officers of the court extend grace, generosity and
C goodwill to each other for the sword we wield is not that of an assassin but that of a gladiator. Litigation becomes more pleasant and indeed pleasurable for we can always sit and dine as friends not least because our learned opponent is not our adversary. Little wonder that we always refer to counsel on the other side as our
D 'learned friend.'

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